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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 180

T. W. AND EVELYN B. WHEELER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO THE MEMORANDUM OF THE UNITED STATES WHICH OPPOSES THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The United States of America has filed its Memorandum in Opposition to Petitioner Wheelers' petition for writ of certiorari and has charged as one of the two grounds of opposition that the petition was not timely filed.

As shown by Appendix I, attached hereto, said petition was mailed to the Clerk of this Court on May 24, 1963, by first class mail with proper address and postage more than four days prior to the expiration on May 28, 1963, of the 90 day time limit provided by 28 U.S.C.A., Sec. 2101(c). Evidence that the petition was posted on May 24, 1963, has been retained in the office of the Clerk. As shown in Appen-

dix II, attached hereto, the petition for writ of certiorari should have been received and filed by the Clerk of the Supreme Court in the ordinary course of mail delivery on May 27, 1963, more than one full day before the expiration of said time limit. However, due to an extraordinary transit of 8 days from the United States Post Office in San Antonio, Texas, to the Office of the Clerk of the Supreme Court of the United States in Washington, D. C., the Petition for Writ of Certiorari was received and filed by the Clerk on June 1, 1963, and was not filed within the period deemed under Rule 22(3) of the Revised Rules of the Supreme Court of the United States, as amended, to be timely for petitions for writ of certiorari. Upon learning that the petition had not been received by the Clerk by May 28, 1963, attorneys for Petitioners submitted an application to Justice Black for an extension of time within which to file the petition. Attached to the application were the orginal of Appendices I and II which are attached hereto and are now on file with the Clerk. The application for extension of time was personally delivered to the Clerk by counsel for Petitioners who traveled to Washington, D. C. to make sure that the application was received and also to present said application to Justice Black. However, counsel did not submit the application personally after being informed that it was not necessary to do so. Said application for extension of time was denied by Justice Black on June 7, 1963, with the further ruling, however, that this did "not prejudice the right of Petitioners to have the full court determine the question of the timeliness of this petition for certiorari."

Petitioners used every reasonable precaution in preparing and posting said petition for writ of certiorari so that it would reach the Clerk and be filed on or before

May 28, 1963. Furthermore, in compliance with Rule 33 (2) (a) of the Revised Rules of the Supreme Court of the United States, on May 24, 1963, counsel for Petitioners also served the Solicitor General and all attorneys of record who represented the United States by mail with copies of Petitioners' application for writ of certiorari. Service was made by mail, airmail postage prepaid, and should have been received by the Government's attorneys on or before May 28, 1963. Thus, the United States had proper notice of the Petitioners' application for writ of certiorari, and it is therefore fair to presume that all attorneys so served thought (until they received notice from Petitioners to the contrary) that said petition was filed within the time prescribed in Rule 23(3) of the Rules of the Supreme Court. Although the government now opposes the petition on the ground that it was "out of time," no possible prejudice has been suffered by the United States as a result of the filing of said petition on June 1, 1963.

28 U.S.C.A., Sec. 2101(c) provides that " . . . Any writ of certiorari intended to bring any judgment . . . in a civil action . . . before the Supreme Court for review shall be . . . *applied for* within 90 days after the entry of such judgment or decree." These Petitioners did apply for the writ within the specified 90 day period. They did so when they posted the application on May 24, 1963. Thus they did all that was physically possible for petitioners short of personally traveling 2,500 miles to the Clerk's office with the required documents. Nowhere in the statute has Congress indicated that the Supreme Court may not consider an application for a writ of certiorari which is transmitted to the Clerk and is filed after the 90 days have elapsed where—as in this case—the application was made within the 90 day period.

Congress did not require that a petition for writ of certiorari be *filed* with the Clerk within 90 days after entry of judgment; it required only that the writ be *applied for* within that time. Congress surely could have used the word "filed" had it meant to limit the Court's jurisdiction by that arbitrary standard. It did not do so.

The language employed by Congress was, Petitioners submit, in recognition of the problems of communication and transportation which litigants far distant from Washington, D. C., might encounter — such as were suffered by these Petitioners who undeniably posted their petition in time to permit its arrival in due course of mail delivery at the office of the Clerk within the time required. In order to extend the same opportunity for justice to litigants in Texas or California which is granted to parties in Washington, D. C., it is only fair and reasonable to hold that a writ of certiorari is "applied for" if the petition is posted in time to permit its transmission in due course to the Clerk within the 90 day period — even though the petition is not actually received or filed within the 90 days. These Petitioners did all that they could reasonably be required to do. Their petition should be treated as timely filed. There is no language in 28 U.S.C.A., Sec. 2101(c) to the contrary.

Rule 22(3) of the Revised Rules of the Supreme Court of the United States provides only that a petition for writ of certiorari "shall be deemed in time when it and the certified record required by Rule 21 are filed with the Clerk within the time prescribed by law." The rule does not explicitly declare a petition out of time if not filed within the time prescribed by law (which of course requires only the application for and not the filing of the petition

within 90 days). If Rule 22(3) equates *filing* with the *application* for the writ, it goes far beyond the statutory requirements of 28 U.S.C.A., Sec. 2101(c). It thereby would impose a limitation that is non-jurisdictional. Worse, it would be in derogation of Petitioners' statutory rights. This Court, charged with defining and applying the highest ideals of justice of our society, does not penalize its petitioners for errors committed by the United States Post Office. This Court does not rest its rulings on the consequences of the sometime-vagaries of our mails.

The decision of the United States Court of Appeals for the Fifth Circuit, Judge Cameron dissenting, is premised upon the assumption or holding that a taxpayer may not advance inconsistent claims for the refund of taxes paid and that alternative allegations, under Rule 8(a) of the Federal Rules of Civil Procedure, may constitute judicial admissions against the pleader. This novel and dangerous view of the Federal Rules of Civil Procedure relieved the majority below from considering the basic issues of tax law which were raised in the District Court. Although Judge Cameron, in his vigorous dissent, wrote extensively upon these tax questions as well as the majority's remarkable view of pleading in the Federal Courts, the decision below has left important tax matters hanging in limbo, and worse yet, has opened Pandora's Box for future litigants who may attempt to exercise their apparent rights under Rule 8(e) of the Federal Rules of Civil Procedure to "set forth two or more statements of a claim or defense alternately or hypothetically."

These Petitioners, and attorneys throughout the nation, should not be deprived of the clarification of the legal ques-

tions raised and created below simply because of an error in the United States Post Office, when these Petitioners delivered and properly posted their petition within sufficient time to reach the Clerk in the ordinary course of mail delivery within the time limits prescribed by law.

WHEREFORE, Petitioners respectfully request their petition for writ of certiorari be granted.

Respectfully submitted,

By .....
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1500 Alamo National Building
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PAUL E. CASSEB
Majestic Building
San Antonio 5, Texas
Attorneys for Petitioners

APPENDIX I

STATE OF TEXAS }
COUNTY OF BEXAR }

Before me, the undersigned authority, on this day personally appeared FRANCIS W. BAKER, to me well known, who, after being by me first duly sworn, does depose and say as follows:

I am FRANCIS W. BAKER, a member of the Bar of the State of Texas and a member of the Bar of the Supreme Court of the United States. I was an attorney of record for T. W. and Evelyn B. Wheeler in the case styled United States of America v. T. W. and Evelyn B. Wheeler, No. 19178 in the United States Court of Appeals for the Fifth Circuit, and I represented said T. W. and Evelyn B. Wheeler in the preparation of their Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above styled and referenced case.

On December 11, 1962, the United States Court of Appeals for the Fifth Circuit entered judgment against T. W. and Evelyn B. Wheeler in the above referenced case. The Wheelers' Petition for Rehearing was denied on February 27, 1963. Pursuant to 28 U.S.C.A., Sec. 2101(c), a writ of certiorari to review said judgment had to be applied for within 90 days after the entry of the order denying the Petition for Rehearing. Therefore, pursuant to the provisions of Rule 34(1) of the Revised Rules of the Supreme Court of the United States, the Wheelers were required to apply for writ of certiorari on or before May 28, 1963.

On May 24, 1963, at 4:50 P.M., I delivered a package addressed to John F. Davis, Esq., Clerk of the Supreme Court

of the United States, Supreme Court Building, Washington, D. C., to a postal collector in the lobby of the Alamo National Bank in San Antonio, Texas. Said package contained the following:

1. 40 printed copies of the Petition of T. W. and Evelyn B. Wheeler for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit;

2. A certified transcript of the record in the case;

3. 9 copies of the record printed for the use of the Court of Appeals for the Fifth Circuit in Cause No. 19178;

4. Original and one copy of my Entry of Appearance;

5. This firm's check for $100.00 in payment of the docket fee;

6. Proof of Service of the Petition for Writ of Certiorari.

Said package was sent by first class mail, certified mail number 8€2335. I affixed $18.30 postage to said package, the appropriate amount of postage for first class mail of its weight and to its destination.

On May 24, 1963, I served copies of said Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the attorneys for the United States as follows:

a. By mailing a copy in a duly addressed envelope, with airmail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.;

b. By mailing copies in duly addressed envelopes, with airmail postage prepaid to each of Louis F. Oberdorfer, Assistant Attorney General, and Lee A. Jackson.

Meyer Rothwacks, and Douglas A. Kahn, attorneys, all at the Department of Justice, Washington 25, D. C.; and

c. By mailing a copy in a duly addressed envelope, with first class postage prepaid, to Ernst Morgan, United States Attorney, Federal Building, San Antonio, Texas.

Based upon information I have received from the Postmaster in San Antonio, Texas, it was and is my understanding that in the ordinary course of mail delivery, the Petition for Writ of Certiorari which I mailed to the Clerk of the Supreme Court of the United States for filing should have been delivered to him on or before May 27, 1963 — at least one day prior to the deadline provided for the filing of such documents in 28 U.S.C.A., Sec. *210(c)*.

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FRANCIS W. BAKER

SWORN TO AND SUBSCRIBED before me this ..... day of ..... 1963.

.....

Notary Public, in and for
Bexar County, Texas

APPENDIX II

UNITED STATES POST OFFICE
San Antonio 5, Texas

June 3, 1963

Mr. Richard Goldsmith
1501 Alamo National Bank Building
San Antonio 5, Texas

Dear Mr. Goldsmith:

Your first-class mail parcel, certified mail No. 862335, addressed to John F. Davis, Clerk, Supreme Court of the United States, Supreme Court Building, Washington D. C., which you stated was handed to a post office mail collector in the lobby of the Alamo National Bank Building at approximately 4:50 P.M., Friday May 24, 1963, and subsequently postmarked May 24, by this office, should have received the following dispatch and routing to the office of address if all mail connections were made enroute.

Leave San Antonio via	
Long & San Antonio Tr 8	2015 hrs. Fri.
Arrive St. Louis	2300 hrs. Sat.
Leave St. Louis via Pitts & St. L. 14	2320 hrs.
Arrive Pittsburgh	1345 hrs. Sun.
Leave Pitts, via Wash & Pitts Sr 4	2200 hrs. Sun.
Arrive Washington, D. C.	0330 hrs. Mon.

I trust that this information will be of value to you in your correspondence with the addressee in as much as you stated that he received delivery on June 1, 1963.

Sincerely yours,

Daniel J. Quill,
Postmaster

By: George T. Henderson,
Ass't. Postmaster

Note by Petitioners: Mr. Quill's letter indicated that there is only a 20 minute interval for mail connections in St. Louis. However, we have been advised by the United States Post Office in San Antonio that the train scheduled to leave St. Louis at 2320 hours on Saturday is the same train under a different designation which is scheduled to arrive in St. Louis at 2300 hours on the same day. There is, therefore, no possibility that connections might be missed in St. Louis.